United Nations CED/C/MNE/Q/1

International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

List of issues in relation to the report submitted by Montenegro under article 29, paragraph 1, of the Convention*

I. General information

1. Please provide information about the report preparation process, including whether consultations with the Protector of Human Rights and Freedoms, civil society and other relevant stakeholders have taken place.

2. Please provide information on cases in which provisions of the Convention have been directly invoked by complainants before the national courts and/or applied by the relevant authorities.

3. In relation to paragraph 24 of the State party's report (CED/C/MNE/1), please provide additional, updated information on the four cases of war crimes dealt with by courts in Montenegro and clarify why, according to the State party, they do not concern enforced disappearance within the meaning of the Convention.

II. Definition and criminalization of enforced disappearance (arts. 1–7 of the Convention)

4. In relation to paragraphs 12 and 13 of the State party's report, please provide detailed information on existing legal and/or administrative measures aimed at guaranteeing that no derogation from the right not to be subjected to enforced disappearance is made under exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency. Please provide detailed information on the limits prescribed by the Constitution within which guaranteed human rights and freedoms may be restricted, the specific circumstances under which they may be restricted and the duration of such restrictions. Please indicate what the consequences would be of a contradiction between the provisions of the Convention and those of the Constitution of Montenegro. Please also indicate whether any legislation and/or practices concerning terrorism, emergency situations, national security, or other grounds that the State party may have adopted, have had an impact on the effective implementation of the Convention, in

* Adopted by the Committee at its eighth session (2–13 February 2015).

particular the prohibitions stemming from articles 1 and 16 of the Convention (arts. 1 and 16).

5. In the absence of the definition of enforced disappearance as an autonomous crime in the Criminal Code, that is, when it does not constitute a crime against humanity, please specify how "refusal to acknowledge the deprivation of liberty" or "concealment of the fate or whereabouts of the disappeared person" would be punished under Montenegrin law. With regard to the definition of enforced disappearance as a crime against humanity that is contained in article 427 of the Criminal Code, please clarify how that definition complies with the definition of the crime of enforced disappearance contained in applicable international law, including with reference to "widespread and systematic practice". Please also indicate whether there are any initiatives to incorporate enforced disappearance as an autonomous crime in domestic legislation, in line with the definition in the Convention (arts. 2 and 4).

6. Please provide information about the applicable law governing the types of conduct described in article 6, paragraph 1 (a), of the Convention, when enforced disappearances do not constitute a crime against humanity, including ordering, soliciting, inducing the commission of, attempting to commit, being an accomplice to or participating in an enforced disappearance, or any other types of conduct which by virtue of their nature are similar to those mentioned. Please provide examples of the application of the doctrine of command responsibility in accordance with article 440 of the Criminal Code. Please indicate whether a subordinate can lawfully oppose an order to commit acts of enforced disappearance and describe the legal recourse available to the subordinate against any disciplinary measures resulting from his or her refusal to carry out a criminal act ordered by a superior (arts. 6 and 23).

III. Judicial procedure and cooperation in criminal matters (arts. 8–15)

7. Please indicate whether Montenegrin criminal law contemplates the concept of the continuous nature of the crime of enforced disappearance and, if so, whether the statute of limitations would commence as from the moment that the crime ceases. Please clarify whether any statute of limitation applies to criminal, civil or administrative actions brought by victims of enforced disappearance who are seeking a remedy (art. 8).

8. In relation to paragraph 51 of the State party's report, please clarify the implications of the provisions of articles 137 and 138 of the Criminal Code when the criminal offence of enforced disappearance is not punishable under the law of the State in which it was committed. In particular, please provide information on the criteria applied by the Supreme State Prosecutor to permit the exercise of jurisdiction and whether the Convention could be used as a basis to exercise jurisdiction (art. 9).

9. In relation to article 10, paragraph 2, of the Convention, please provide information about the existence of legal or other measures to immediately carry out a preliminary inquiry or investigation to establish the facts should the State party have taken the measures referred to in article 10, paragraph 1, of the Convention. Please indicate how the provisions of article 10 of the Convention can be implemented, in view of the fact that enforced disappearance as an autonomous crime is not considered an offence in domestic legislation and that article 5 of the Law on International Legal Assistance in Criminal Matters states that international legal assistance may be provided if the act constitutes a criminal offence both in the national law and in the law of the requesting States. Please also clarify the extent to which reciprocity is requested in the provision of international legal assistance in

cases of enforced disappearance that does not constitute a crime against humanity (arts. 10 and 13).

10. Please indicate the role of the Department for the Suppression of Organised Crime, Corruption, Terrorism and War Crimes in the investigation and prosecution of cases of alleged enforced disappearance and clarify whether there are any other departments or officials within the police force, the public prosecution service or other relevant agencies specifically trained to initiate investigations of cases of alleged enforced disappearance. In that respect, please also indicate whether the above-mentioned authorities or any others responsible for investigating cases of alleged enforced disappearance: (a) have the necessary powers and resources to conduct investigations; and (b) are subject to any limitations which may restrict their access to places of detention where there are grounds to believe that a disappeared person may be present (arts. 11 and 12).

11. Please provide information about the steps taken, and the results achieved, to bring to justice the perpetrators of enforced disappearances that may have been committed in the past in Montenegro or by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. Please provide information on the measures taken to clarify the fate and whereabouts of the 61 persons reported missing in Montenegro, some of whom may have been victims of enforced disappearance (arts. 11 and 12).

12. Please indicate whether national legislation includes criminal prosecution for all categories of persons in order to comply with articles 9, paragraph 2, and 11 of the Convention. Please also indicate whether denial of extradition could be based on any provisions relating to immunity granted to certain categories of persons and/or officials (arts. 9, 11 and 13).

13. With reference to paragraph 73 of the State party's report, please indicate whether domestic law provides for the suspension from their duties of State officials suspected of having committed or having been involved in the commission of an enforced disappearance, during the investigation. Please also specify whether there are any procedural mechanisms in place to exclude a civil or military law enforcement or security force from the investigation into an enforced disappearance when one or more of its officials have been accused of committing or having been involved in the commission of the offence. With reference to paragraph 74 of the State party's report, please indicate whether, in addition to the protection of witnesses and a person close to them, mechanisms are in place for the protection of complainants, relatives of the disappeared person, their representatives and other persons participating in the investigation of an enforced disappearance, or any person with a legitimate interest requesting information in terms of article 18, paragraph 1, of the Convention about any kind of ill-treatment, intimidation or sanction (arts. 12 and 18).

IV. Measures to prevent enforced disappearances (arts. 16–23)

14. Please provide the following information: (a) the competent authorities to determine the expulsion, return, surrender or extradition of persons; (b) the mechanisms and criteria applied in the framework of expulsion, return, surrender or extradition procedures to evaluate and verify the risk that a person may be subjected to enforced disappearance; and (c) whether it is possible to appeal a decision on expulsion, return, surrender or extradition and, if so, please indicate before which authorities, what the applicable procedures are and whether they have suspensive effect. Regarding paragraph 89 of the State party's report please clarify which articles of the Code of Criminal Procedure are relevant to the

rescinding statement which may be given by a person on his or her extradition to a third State (art. 16).

15. Please indicate whether there is any legal provision that specifically prohibits secret or unofficial detention. Please explain the discrepancy between the provisions of article 29 of the Constitution, which entitle persons deprived of liberty to have a person of their choice "immediately" informed of their situation, and article 180 of the Code of Criminal Procedure, which states that notification of custody must be given at the latest "within 24 hours" from the moment of deprivation of liberty. Please provide information on the existence of protocols to guarantee that prompt notification and access to lawyers, doctors and family members are ensured in practice, and not only in law, from the outset of the deprivation of liberty and at the moment of release. Please also provide information on whether any conditions and/or restrictions apply to the measures provided for in article 17, paragraph 2 (d), of the Convention. Please provide information on the guarantees that any person with a legitimate interest may bring proceedings before a court in order for a decision to be taken as to the lawfulness of the deprivation of liberty, as provided for in article 17, paragraph 2 (f), of the Convention (arts. 17 and 21).

16. In relation to paragraph 112 of the State party's report, please explain in which instances the Code of Criminal Procedure provides that persons deprived of their liberty without a decision must not be brought immediately before the State Prosecutor and, in such a case, what would be the time frame for presenting the person deprived of his or her liberty before a competent authority. Please indicate whether domestic law guarantees to any person with a legitimate interest access to the information referred to in article 18, paragraph 1, of the Convention. In that respect, please also indicate whether any restrictions on the right to information enshrined in article 18, paragraph 1, of the Convention apply and, if so, please: (a) comment on their compatibility with article 20 of the Convention and other relevant international human rights standards; (b) provide information on their nature and duration; (c) provide information on the existing measures to guarantee that any person with a legitimate interest has access to a prompt and effective judicial remedy to obtain information without delay and indicate whether such guarantees can be suspended or restricted in any circumstances; and (d) provide information on existing means of appeal against a refusal to disclose information on persons deprived of their liberty. In addition, please provide information on existing legislation to ensure protection from any ill-treatment, intimidation or sanction of persons who request access to information and all those involved in the investigation of an enforced disappearance, and the existence of mechanisms to that effect (arts. 18 and 20).

17. Please provide information about the Montenegrin Government Commission on Missing Persons, its mandate, composition and working methods. Please indicate whether the Commission or any other organ of the State party keeps a national DNA database or other ante-mortem information that may be relevant to identify victims of enforced disappearance. Please provide information on concrete results achieved by the Montenegrin Government Commission on Missing Persons, including data on the number of persons located and/or remains identified to date (arts. 19 and 24).

18. Please provide information on any domestic law that provides for restriction of access to information about persons deprived of their liberty, and the nature and duration of such restrictions. Please provide information on the means of appeal against a refusal to disclose information about persons deprived of their liberty. Please respond to allegations that the courts do not disclose information on their activities or on decisions they take, notwithstanding the fact that the right to access information is guaranteed under article 51 of the Constitution and the Law on Free Access to Information (art. 20).

19. Please provide information about legislative or other measures taken to prevent, and to impose sanctions for, the conduct described in article 22 of the Convention. Please

indicate whether the State party provides specific training on the Convention, in terms of article 23 thereof, to civil and military law enforcement personnel, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, in particular members of the police, the judiciary and migrant authorities. Please indicate the nature and the frequency of the training provided, and the authorities in charge of facilitating such training (arts. 22 and 23).

V. Measures for reparation and protection of children from enforced disappearance (arts. 24 and 25)

20. With reference to paragraph 140 of the State party's report, please explain how the notion of "injured party", according to Montenegrin law, would satisfy the wider definition of "victim" as any individual who has suffered harm as the direct result of an enforced disappearance, in line with article 24, paragraph 1, of the Convention. Please explain how the notion of injured party would allow the status of victim to be granted in cases when criminal proceedings are not initiated against the perpetrators. Please indicate whether the State party envisages incorporating into domestic law a definition of victim that is in accordance with the above-mentioned provision in the Convention (art. 24).

21. In relation to paragraphs 141 and 142 of the State party's report, please provide detailed information on the mechanisms that guarantee the right of victims of enforced disappearance to know the truth and their participation in the proceedings, in accordance with article 24, paragraph 2, of the Convention (art. 24).

22. Please provide detailed information on the relevant procedures in place for seeking and obtaining compensation, including who would be responsible for providing it. Please also indicate whether, besides compensation, domestic law provides for other forms of reparation for persons who have suffered harm as the direct result of an enforced disappearance, including restitution, rehabilitation, satisfaction and guarantees of non-repetition, in line with article 24, paragraph 5, of the Convention (art. 24).

23. Taking into consideration the information provided in paragraph 151 of the State party's report, please indicate whether the State party envisages adopting legislation to address the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights, including a procedure to obtain a declaration of absence by reason of enforced disappearance, so that victims do not have to declare the disappeared person dead or presumed dead (art. 24).

24. Please provide information on how the wrongful removal of children who are victims of enforced disappearance is prevented and punished in criminal law. Please provide information on the measures taken to search for and identify children who are victims of enforced disappearance, including through DNA databases, as well as the procedures in place to return them to their families of origin. In relation to paragraph 160 of the State party's report and article 61 of the Family Law of 2007, please explain under what circumstances and how that law can limit the right of a child to know who his or her parents are. Please also indicate the procedures in place to guarantee the right of disappeared children to have their true identity re-established (art. 25).

25. Please provide information on the procedures in place to review and, if necessary, annul any adoption or placement of children which originated in an enforced disappearance, including the conditions for adoption to be valid; whether there is a specific time frame for an adoption to be reviewed and/or annulled; persons entitled to initiate such a procedure, including in cases where the adopted child is under 15 years of age. If such procedures are

not in place, please indicate whether there are any initiatives to bring national legislation into line with article 25, paragraph 4, of the Convention (art. 25).